JAMES M. CHUDNOW

IBLA 85-96 Decided March 24, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, imposing stipulations to oil and gas lease offer NM-A 56477.

Set aside and remanded.

1. Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Stipulations

> The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

APPEARANCES: James M. Chudnow, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

James M. Chudnow has appealed from an August 22, 1984, decision of the New Mexico State Office, Bureau of Land Management (BLM), requiring him to sign and return special stipulations within 30 days of his receipt of the decision. On March 8, 1983, Chudnow filed over-the-counter lease offer NM-A 56477, for 5,135 acres of acquired land in Santa Fe National Forest, T. 21 N., R. 4 E., New Mexico Principal Meridian, Rio Arriba County, New Mexico.

In his notice of appeal, Chudnow contended the proposed stipulations were vague partly because they referred to a map which was not furnished to him for his inspection, and that the lands involved were not designated by acreage or percentage. He argued adequate and detailed facts concerning the lease restrictions should be provided. By letter dated October 30, 1984, BLM informed Chudnow it had "failed to use the proper form in requesting stipulations," and once again was sending copies of them for his consideration, together with a copy of the previously omitted map referred to in the stipulation. Attached to this letter was another decision, dated October 30, 1984, requiring Chudnow to sign the special stipulations before November 30, 1984.

By an order dated November 20, 1984, the Board of Land Appeals vacated BLM's October 30, 1984, decision, reiterating the well-established principle that, when a notice of appeal is filed, BLM loses authority to take any further action on the case until this Board acts on the appeal. However, because BLM clouded the status of Chudnow's appeal by providing the omitted map, Chudnow was afforded 30 days to "show cause why the appeal should not be dismissed as moot and to present his statement of reasons why the proposed stipulations should be qualified."

In his statement, which was timely received, Chudnow responded to the order as follows: "I feel that BLM has not cured the "vagueness" of the stips -- there still is no information as to the percentage of the acreage involved, for example -- and thus I'd like my appeal to be "continued" thru the IBLA procedures * * *." (Emphasis in original.)

Chudnow's oil and gas lease offer NM-A 56477 was submitted to the U.S. Forest Service in June 1984 for approval and addition of any special surface and environmental protection stipulations deemed necessary. The Forest Service recorded no objection to the issuance of the lease, provided it was subjected to "inclusion of the stipulations in BLM Forms 3109-3 and 3109-5, and our Supplement B and Notice to Lessee (copy enclosed) to Form 3109-3." The case file does not contain a copy of Form 3109-5 or any discussion by BLM of such form. The Forest Service's enclosed copy of Supplement B to Form 3109-3, "Endangered Species, Cultural and Paleontological Resources Stipulations," was marked with a notation reading: "Bill said do not send LGG 10-26-84." There is no evidence showing either form was sent to Chudnow for his review and signature. Attached to the copy of the August 22, 1984, decision which appears in the case file was a copy of a map of the leased lands, a copy of Form 3109-3, "Stipulation for Lands Under Jurisdiction of Department of Agriculture," and a copy of "Notice to Lessee."

The record shows Chudnow signed and returned several copies of Form 3109-3, along with the executed copies of the new lease form (Form 3100-11 (March 1984). In fact, in his notice of appeal, Chudnow acknowledged he had returned the lease forms and copies of Form 3109-3. His appeal focused only upon those conditions stated in the "Notice to Lessee." The full text of that document is as follows:

NOTICE TO LESSEE, LEASE NO. NM A 56477

All or portions of this leasehold contain the following resource values:

1. Limited water in area. Wildlife and livestock require unrestricted and undisturbed access one quarter mile radius from Road Mesa trick tank located on the township line adjacent to NE1/4NW1/4NW1/4, Section 1, T21N, R4E, N.M.P.M. Need for restricted activity is year-long.

2. Fragile soils and vegetation, and important wildlife habitat on Cienega Redondo, a high elevation wet meadow. Limited activity within one-quarter mile of Cienega Redondo situated in SE1/4, Section 23, T21N, R4E, N.M.P.M., and labeled 19 on the attached map. Restriction needed year-long.

3. Important wildlife habitat, riparian habitat and watershed values along the west and south forks of Polvadera Creek and Chihuanuenos Creek labeled 19 on the attached map. Activity, except casual use, prohibited or severely restricted year-long.

4. Steep slopes (over 40%) in areas labeled 25 on the attached map which are very susceptible to erosion, lowered watershed values and visual quality. Surface uses restricted and critically controlled year-long.

These resources may require site specific constraints for their protection. Joint field examinations in areas of potential ground disturbance are invited.

For further information please contact:

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[1] It is well established that the Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land located in a national forest in order to protect the environment and other land use values. James M. Chudnow, 78 IBLA 317 (1984); James M. Chudnow, 62 IBLA 16 (1982). The need for clarity of purpose and intent in imposing stipulations has been explained as follows:

> The need for a stipulation should be clear, and the stipulation should be a reasonable means to the intended purpose. The Forest Service's recommended stipulations should be carefully considered by the Department. Such stipulations will be upheld on appeal, however, only if the record shows that BLM adequately considered the factors involved. H. E. Shillander, 44 IBLA 216 (1979); Neva H. Henderson, 31 IBLA 217 (1977); Earl R. Wilson, 21 IBLA 392 (1975); A. A. McGregor, 18 IBLA 74 (1974).

James M. Chudnow, 78 IBLA at 319.

The document at issue here, "Notice to Lessee," does not restrict Chudnow from developing the lease should it be issued. In a recent decision,

Robert and Frances Kunkel, 84 IBLA 140 (1984), the Board reviewed a document forwarded to a potential lessee entitled "Surface Disturbance Notice." Upon reviewing the document, the Board concluded, "it is not a 'stipulation'; rather it is merely notice to the lessee that prior to disturbing the surface of the leased lands, it should contact the surface management agency." Id. at 143. We observed the notice did not impose any mandatory requirements or obligations on the co-lessees but merely stated they should cooperate with the agency. Without specific requirements to be followed, the notice was held not to constitute a stipulation to the lease.

The "Notice to Lessee" does not state any mandatory requirements with which Chudnow should comply but only suggests cooperation with the Forest Service. It describes a need for "restricted activity" but neither gives any indication of what activity will be prohibited nor indicates the degree of restriction to be imposed. It gives notice that, when seeking a permit to carry out its activities certain areas will require higher standards of care. Were this document one prepared by BLM, and, therefore, subject to direct review by this Board, it would not be classified as a list of stipulations to the lease. Here, the "Notice to Lessee" was not prepared by BLM, but by the Forest Service. However, BLM's actions following its receipt from the Forest Service of the signed lease forms and copies of Form 3109-3, the stipulations received and accepted by Chudnow, indicate both agencies view the notice as a lease stipulation. BLM has asked Chudnow as lessee to "sign and return" the special stipulations (Notice to Lessee) so they could be incorporated into the lease. The only possible inference to be drawn from this exchange is that BLM construes the "Notice to Lessee" to be a necessary stipulation to the lease which Chudnow was required to accept as a condition to issuance of the lease. The Forest Service, by conditioning lease issuance upon the notice, has also indicated it regards the "notice" as a stipulation.

Appellant's lease offer is for 5,135 acres of acquired land in Santa Fe National Forest. In cases involving leases on acquired land, BLM lacks authority to reject or even to modify lease conditions sought to be imposed by the Forest Service. Section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982), provides, in pertinent part:

> No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit * * * subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered.

See also 43 CFR 3101.7-3, 3101.7-4.

In this circumstance, therefore, the Forest Service may condition the lease and BLM lacks the power to alter the conditions imposed. Although the "Notice to Lessee" is vague, it is quite apparently regarded by the Forest

Service as a condition to the lease, since the Forest Service requires appellant to acknowledge the notice as though it were a limitation upon the terms of the lease. There is, therefore, no action which either BLM or this Board may take which will directly deal with appellant's argument on appeal, since appellant takes issue with the form of the conditions set by the Forest Service, which agency has the authority to establish whatever conditions to the lease are deemed necessary.

The posture of this appeal is now such that, if the BLM decision is affirmed by this Board, appellant's offer will be rejected for his failure to accept the Forest Service conditions to his lease. See James M. Chudnow, 89 IBLA 361 (1985), for a discussion of consequences to a lessee of appeal from a decision to impose restrictive stipulations to a lease. Because of this circumstance, and because this necessary result may not have been readily apparent when this appeal was filed because of the failure by BLM to provide appellant the map showing the extent of the lease affected by the notice, the decision by BLM is set aside and appellant is allowed 30 days from the date of receipt of this decision to file whatever administrative appeal he may wish to take with the Forest Service. If, at the end of the 30-day period no appeal has been filed, BLM is directed to enter a rejection of appellant's offer upon its records. Should appellant's appeal to the Forest Service be rejected or denied, he shall have 30 days from the denial of his appeal to accept the conditions stated by the Forest Service. Any further attempts by appellant to obtain BLM action to alter conditions imposed by the Forest Service shall be treated as a protest by BLM and shall result in a rejection of the lease offer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM; appellant shall notify the New Mexico office of the date he makes his appeal to the Forest Service, and shall furnish proof the appeal was taken within the 30-day period allowed by this decision.

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN THE RESULTS:

I agree with the results of the lead opinion but find it to be an over-simplification of the Bureau of Land Management (BLM) responsibility to the Forest Service and a prospective lessee.

The lead decision notes the "Notice to Lessee" "does not restrict Chudnow from developing the lease should it be issued." It holds the notice does not state any mandatory requirements, but suggests cooperation. According to the lead decision, the notice describes "restricted activity," but "neither gives any indication of what activity will be prohibited nor indicates the degree of restriction to be imposed." It merely states that, in these areas, "higher standards of care" will be required.

With this in mind the lead decision notes that both BLM and the Forest Service "view the notices as lease stipulations," which Chudnow "was required to accept as condition to issuance of the lease." Later the lead opinion states the "Forest Service may condition the lease and BLM lacks the power to alter the conditions imposed" even though the conditions imposed are found to be "quite vague." The lead decision then concludes "there is no action BLM or this Board may take which will directly deal with appellant's arguments on appeal, since appellant takes issue with the form of the conditions set by the Forest Service." At this point I find myself unable to concur.

A lease is a contract between the United States and the lessee. BLM is charged with the responsibility of overseeing the interests of the Government. See 43 CFR 3161.1. It is charged with the obligation to "require compliance with lease terms." 43 CFR 3161.2. However, as noted in the lead opinion, 30 U.S.C. § 352 (1982) provides that oil and gas leases shall be "subject to such conditions as [the official having jurisdiction over the lands] may prescribe to insure the adequate utilization of the lands for the primary purposes for which they * * * are being administered." A "stipulation" to a lease becomes a part of the lease (43 CFR 3101.1-2) and BLM must enforce the stipulation.

While as a general principle, if a surface manager submits stipulations, the stipulations must be included as a part of the lease, I do not consider this requirement to be an absolute. As a condition to its acceptance and incorporation as a part of the lease terms, BLM must determine that the proposed stipulations are sufficiently specific to ensure the adequate utilization of the lands for the primary purpose for which they are being administered. 1/ If they do not, BLM has an obligation to either seek clarification of the stipulation by the Forest Service or impose such additional language as is necessary to render the stipulation enforceable.

1/ It is my opinion that, for example, if the proposed stipulation submitted by the surface management agency was contrary to the law or had nothing to do

I also find the "stipulation" as proposed to be vague. 2/ If vague, it is unenforceable. If unenforceable it has no place in the lease. The matter should be remanded with instructions to seek clarification from the Forest Service or amend the stipulation to render it meaningful.

R. W. Mullen
Administrative Judge

fn. 1 (continued)
with surface management, it could be rejected by BLM. As the agency responsible for carrying out the requirements of 30 U.S.C. §§ 351-359 (1982), BLM has authority to reject proposed stipulations which are either unenforceable or fail to meet the requirements of 30 U.S.C. § 352 (1982).
2/ Judge Grant has found the "stipulation" to not be vague because an application for permit to drill on the identified lands would be properly denied. The application could be denied without the "stipulation." Would this be true where, for example, a power line may cross the designated area? The appellant is given no guidance as to what may be allowed, or the basis for disallowing a use, pursuant to the stipulation.

ADMINISTRATIVE JUDGE GRANT CONCURRING IN THE RESULT:

I must concur in the result in this case upholding the decision to require consent to the stipulations imposed by the Forest Service as a condition of lease issuance.

Initially, it must be recognized that the Bureau of Land Management (BLM), does not have the discretion to reject conditions imposed by the Forest Service on oil and gas leases such as this one issued pursuant to section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982). Section 3 of the Act provides in pertinent part as follows:

> No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department * * * having jurisdiction over the lands containing such deposit * * * and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered.

30 U.S.C. § 352 (1982); see 43 CFR 3101.7-3(a), 3101.7-4(a) and (b). Thus, the Forest Service may clearly set the conditions, as they have here, for oil and gas leasing on such lands.

I must disagree with the conclusion in the lead opinion that the stipulations embodied in the notice to lessee required by the Forest Service do not restrict the rights of the lessee. The notice, quoted in the lead opinion, identifies certain areas in which surface-impacting activities will be restricted or prohibited for the reasons specified. Although appellant had a legitimate cause for complaint when the initial BLM decision omitted the map on which the areas of restricted use were identified, I find the map subsequently provided clarifies the ambiguity as to the affected areas. I find appellant's complaint as to the failure to identify the percentage of the acreage affected to be without merit where the area is clearly identified on the map. Hence, I find these stipulations to be neither vague nor unenforceable. Thus, if an application for permit to drill were sought for lands in the surface restricted areas, I believe a decision denying a well site on such a location would be sustained on appeal.

I find the notice to lessee imposed by the Forest Service in this case to be distinguishable from that reviewed by the Board in Robert and Frances Kunkel, 84 IBLA 140 (1984), in that the notice in this case identifies restrictions on surface-impacting activities associated with specified sites. This is different from Kunkel where the notice merely restated the existing legal requirement for approval of site-specific plans for surface-impacting activities (e.g., drilling, roadbuilding, etc.). See 43 CFR Subpart 3162. Hence, I find this amounts to a stipulation to lease issuance for which the consent of the prospective lessee is properly required. See Robert P. Schafer, 71 IBLA 191 (1983).

C. Randall Grant, Jr.
Administrative Judge.